

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Prehearing Statement of Stephanie Ajello
1934 35th Place, NW (Square 1296E, Lot 312).

I. INTRODUCTION.

This Statement is submitted on behalf of Stephanie Ajello (the “**Applicant**”), owner of the property located at 1934 35th Place, NW (Square 1296E, Lot 312) (the “**Property**”). The Property is located in the R-20 Zone and is currently improved with a two-story, two-unit (flat) row building (the “**Building**”). As discussed more fully below, the Applicant is proposing to construct a third story addition (the “**Addition**”) and in order to increase the living space. The Applicant is also proposing to replace the existing rear stair and deck in order to secure the second floor access to the rear yard.

Area Variance Relief

Replacement Deck and Stair

The existing Building has one unit on each floor. Accordingly, the second floor is a separate unit and the only direct access to the Property’s rear yard is through an existing deck and staircase at the rear of the Building. The Applicant is proposing to replace that existing landing and staircase to the second story with a similar landing and staircase. The proposal will result in a negligible increase to the lot occupancy only 0.2%-- or 1.73 square feet—from 69.8% to 70%. The proposed stair leading to the second story deck extends slightly further into the rear yard than the existing deck and landing; therefore, the rear yard is decreasing from 11 feet to 7.7 feet. Ordinarily, the Applicant could seek special exception relief for the rear yard and lot occupancy requirements, as the proposal is within the 70% lot occupancy threshold; however, D-5201 relief is only available for additions to single-family dwellings and the existing use is a flat (2-units). Accordingly, area variance relief is required from the rear yard and lot occupancy requirements of the R-20 Zone for the replacement.

Third Story Addition

The Applicant is also proposing a relatively small third story addition to increase the living space of the upper unit. This proposed third story addition could qualify for a minor deviation, as

the total lot occupancy of the proposed third story is only 61.2%, within the 2% flexibility. However, as the Applicant is pursuing BZA relief for a proposed deck and stair replacement, the Applicant is including the third story addition in its request for lot occupancy relief, as lot occupancy is measured floor-by-floor. Separately it also triggers the need for a use variance, along with the deck and stair replacement, as described below.

Use Variance Relief

The existing use of a flat (2-units) is considered a non-conforming use in the R-20 Zone in which the Property is located. Accordingly, even though the use is not changing, the Applicant must also seek use variance relief¹ for the third story addition and deck replacement.

II. JURISDICTION OF THE BOARD.

The Board has jurisdiction to grant the respective area and use variance relief requested pursuant to Subtitle X § 1002.1 (a)-(b).

III. BACKGROUND.

A. Description of Property and Surrounding Area

The Property is located in the R-20 Zone. It is a small corner lot, with a land area of 865 square feet. The existing Building is only two stories where many of the lots on this block have added a third story by right. While the two properties to the south are listed as “Residential Conversion” on tax records, the buildings have a third story. Based on comments in DC Permit records, it appears the uses were abandoned some time ago. Accordingly, this is the only remaining flat in this square.

¹ The use variance relief pursuant to C-204.1 which states that “a nonconforming use of land or structure shall not be extended in land area, gross floor area, or use intensity; and shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment of this title.”

Abutting the Property to the north is Whitehaven Parkway, NW. Abutting the Property to the south is a three-story row building. Abutting the Property to the west is a public alley. Abutting the Property to the east is 35th Place, NW. The area is made up of smaller lots with row dwellings, many of which have constructed third story additions as a matter-of-right.

B. Proposed Project

The current Building has two stories- a first floor and second floor. There is one unit per floor and the existing units are 560 and 539 square feet, respectively. The Applicant is proposing to add a third story addition to the building and expand the upper unit by 530 square feet. The existing Building footprint occupies 65% of the lot and the third story addition will only occupy 61.2% of the lot. The Applicant is also proposing to replace an existing deck and stairs. The replacement will very slightly increase the lot occupancy by only 0.2% --or 1.73 square feet— from 69.8% to 70%. The proposed spiral stair leading to the second story deck extends about 3 feet further into the rear yard than the existing deck and landing; therefore, the rear yard is decreasing from 11 feet to 7.7 feet.

IV. THE APPLICATION MEETS THE REQUIREMENTS TO GRANT AREA VARIANCE RELIEF.

A. Area Variance Standards

The burden of proof for an area variance is well established. The Board of Zoning Adjustment may grant an area variance if it finds that “(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.” *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, No. 16-AA-932, 2018 WL 1748313, at *2 (D.C. Apr. 12, 2018); *Ait-Ghezala v. District of Columbia Bd. of Zoning*

Adjustment, 148 A.3d 1211, 1216 (D.C. 2016) (quoting *Washington Canoe Club v. District of Columbia Zoning Comm'n*, 889 A.2d 995, 1000 (D.C. 2005)) (internal quotation marks omitted).

As set forth below, the Applicant meets the three-part test for the requested variance for relief from C-306.1(a).

B. Area Variance for Rear Yard and Lot Occupancy

While the standard for approval of an area variance is lower than a use variance (practical difficulty vs. undue hardship), the unique/exceptional condition and the result if relief is not granted, is the same in this case for both the area variance and use variance requests. Accordingly, the Applicant is analyzing both variances below, rather than repeat the same arguments in two sections.

V. THE APPLICATION MEETS THE REQUIREMENTS TO GRANT USE VARIANCE RELIEF.

The Applicant is requesting use variance relief pursuant to C-204.1 in order to minimally increase an existing unit. The Board is authorized to grant use variance relief where it finds that three conditions exist:

- (1) The property is affected by exceptional size, shape, or topography or other extraordinary or exceptional situation or conditions;
- (2) The owner would encounter an undue hardship if the zoning regulations were strictly applied; and
- (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.

See French v. District of Columbia Board of Zoning Adjustment, 628 A.2d 1023, 1035 (D.C. 1995); see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment, 534 A.2d 939 (D.C. 1987).

The variance procedure has many purposes. It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights and prevent usable land from remaining idle. These purposes infuse meaning into the phrase “exceptional and undue hardship.” *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 541-42 (1972).

For the Board to grant use variance relief, “it must be shown that the regulations ‘preclude the use of the property in question for any purpose for which it is reasonably adapted, *i.e.*, can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?’” *Palmer v. BZA*, at 542, citing 2 A. Rathkopf, *The Law of Zoning and Planning*, Note 21, at 45-5 (3d ed. 1962).

A. Unique Physical Aspect or Other Exceptional Situation

In order to prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.2d 1091, 1096 (D.C. 1979). The Court of Appeals held in *Clerics of St. Viator v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the property, not just the land; and that “...property generally includes the permanent structures existing on the land.” *Id.* at 293-94. The Court held that the exceptional situation standard of the variance test may be met where the required hardship is inherent in the improvements on the land (*i.e.*, the building or structure) and not just the land itself. In *Monaco v. D.C. Board of Zoning Adjustment*, the Court of Appeals

held that the history of a property could be considered in making the determination of uniqueness. In that case, the Court affirmed the BZA's broad interpretation of the uniqueness test and the Board's ability to consider the history of the Applicant, its traditions, as well as the existing structure on the property.

The Property is unique because of the existing improvements on the Property. The Building was constructed in 1935 and the first certificate of occupancy for a flat was issued in 1958 noting that the previous use was also a flat, indicating that the C of O was just continuing the previous use. The original permit from 1935 could not be obtained, accordingly, this is the best evidence that the building has been used as a flat certainly since 1958 and likely since 1935. Accordingly, the use has existed in this building for at least 64 and possibly 87 years. (See C of Os included with this submission).

All other buildings on this block are currently used as single-family homes. The tax records show that at one point, the two buildings to the south may have been configured as flats, but those uses have since been abandoned. There is also some question about how the buildings were configured insofar as the inspection comments for the property directly to the south indicate that the configuration was not consistently maintained or obvious during inspections. Whereas the subject Property's 2012 inspection had no issues, and it was immediately confirmed to be a flat. Accordingly, this is the only property used as a flat in the block and in the entire area based on a search of the available property records.

The single-family homes on the block are all permitted to construct the proposed third story addition by right, as many on the block have already done. Even without the third story addition, the Applicant would still have to ask for use and area variance relief for the deck, unlike the other properties which would only be required to obtain special exception relief for the same proposal.

For example, the three homes directly to the south of the subject Property have third story additions (1932, 1930 and 1928). Others further down the block have also been extended or expanded. Photos of the block have been submitted to the record with this Application.

B. Strict Application of the Zoning Regulations Would Result in an Undue Hardship.

An owner is presented with an undue hardship when their “property cannot be put to any zoning-compliant use for which it can be reasonably adapted, i.e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof.” *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). The Applicant asserts that it clearly meets this standard as articulated by the Court in *Palmer*, as using the subject property for any conforming use would not result in a fair and reasonable return. In *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C.1990), the Court of Appeals held that “at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure.”

Practically speaking, the third story addition contemplated is only 61.2% lot occupancy and could be constructed by-right but for the existing configuration (with a minor deviation). Were the zoning regulations strictly enforced, the Applicant would effectively be prevented from ever improving the property, unless of course she eliminated one of the units. Eliminating one of the units would result in an undue hardship to the Applicant. First, it would result in the loss of income and a loss of value of a 560 square foot 1-bedroom residence. There are not any comps in the area for this exact scenario, given that it is the only flat in the area. The nearby comps have a large range for the price per square foot, listed between \$550-\$1200. Using the median point between the two allows for a price point of \$875 per square foot in this area. Using that price per square foot, the value of the 560 square foot unit is approximately \$500,000. And the second-floor unit—

the one proposed to be expanded—is slightly less at approximately \$470,000. The addition itself is only 530 square feet, so giving up a second unit valued \$500,000 to allow for an additional 530 square feet of area which would not be worth \$500,000 given cost of construction and added value, is not a feasible option.

But that is not the only cost the Applicant would face, as the Building is configured as two distinct units with separate entrances and kitchens. Accordingly, the Applicant would be faced with substantial additional renovation and expense if the Building had to be redesigned to remove one dwelling unit and make the building a single-family dwelling to comply with the current R-20 regulations. For example, DCRA does not permit two separate ranges or wet bars—essentially the elements of a second kitchen—in any single-family home in the district, regardless of any covenants. So, the Applicant would at a minimum be required to demolish and renovate the existing kitchen area, requiring a substantial amount of investment all in an effort to remove a valuable income producing housing unit existing for at least 64 years from the housing supply. Accordingly, without the relief, no improvements to the Building would ever be possible, or rather would not be feasible from an economic perspective, because the cost to convert the property to a single-family home, coupled with the loss of value from the loss of a housing unit would far exceed the possible value added to the property by an addition.

With respect to the rear yard and lot occupancy relief, but for the existing 2-unit configuration, special exception relief would be available for the replacement of the landing and stairs. Without the relief, the Applicant will have no way to replace a means of egress from the rear of the second floor which could potentially create safety issues. The solution would be to eliminate that egress and turn the door to a window. This would ultimately eliminate all access from the upper unit to the rear yard and alley, resulting in a loss of reasonable access to the yard

for the unit above, an obvious practical difficulty with respect to the area variance. Further, this would also result in a hardship with respect to the area variance, as without the relief it is not possible to retain the existing second floor access to the backyard long-term as the inability to repair or replace stair and deck would eventually lead to its removal.

C. Relief Can be Granted without Substantial Detriment to the Public Good and without Impairing the Intent, Purpose, and Integrity of the Zone Plan.

Relief can be granted without substantial detriment to the public good and can be granted without impairing the intent, purpose, and integrity of the Zone Plan. The Building is already configured for use as a flat and has been configured as such for at least 64 and possibly 87 years. The Applicant is simply proposing to update the Building through a third story Addition which conforms to all development standards of the R-20 Zone and a deck which would otherwise be permitted via special exception only, but for the existing 2-units. Further, the overall increase occupancy is negligible-- only 0.2% and will therefore not impact available light and air to the only adjoining property. The deck is being replaced in the same location in which it currently exists, therefore, it will not compromise the privacy and use of enjoyment of neighboring properties. The third story Addition would otherwise be permitted via minor deviation and is within the height and stories limit of the zone, therefore, the proposal will not visually intrude upon the character scale and pattern of houses along the block- many of which have already been increased to three stories. While the variance standards are higher than these special exception standards, the proposal meets the spirit and intent of the special exception regulations that typically govern additions of this type and specifically relate to neighboring properties, in addition to the criteria herein for variance approval.

VI. CONCLUSION.

For the reasons outlined in this Prehearing Statement, the Applicant respectfully requests the variance relief as detailed above.

Respectfully Submitted,

Alexandra Wilson _____

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